No. 16-1466

IN THE

Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE COMPETITIVE ENTERPRISE INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

SAM KAZMAN
COMPETITIVE ENTERPRISE INSTITUTE
1310 L St., N.W.
Washington, D.C. 20005

ANDREW M. GROSSMAN
Counsel of Record
MARK W. DELAQUIL
RANDAL J. MEYER
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

Counsel for the Amicus Curiae

QUESTION PRESENTED

Whether the First Amendment permits government to force its employees to associate with and subsidize a labor union that, in the course of its representational role, advocates on gun control, marijuana legalization, public funding for abortion providers, adoption of the metric system, and other divisive issues.

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INTEREST OF THE *AMICUS CURIAE*[1]

Founded in 1984, the Competitive Enterprise Institute ("CEI") is a non-profit public policy organization dedicated to advancing the principles of limited government, free enterprise, and individual liberty. CEI frequently publishes research and commentary on labor law and policy, as well as the speech and associational rights of workers subject to labor laws. It also regularly participates in litigation, as both a party and an *amicus curiae*, concerning the scope and application of First Amendment rights. The instant case concerns CEI because the Illinois law at issue forces state employees to associate with and subsidize the political and ideological advocacy of a private labor union against their will.

INTRODUCTION AND SUMMARY OF ARGUMENT

The injury identified by the plaintiffs in *Abood v. Detroit Board of Education* was that "a substantial part" of the agency fees they were required to pay a labor union would be used to fund union "activities and programs which are economic, political, professional, scientific and religious in nature of which

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[1] Pursuant to Rule 37.3(a), letters consenting to the filing of this brief are filed with the clerk. In accordance with Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

Plaintiffs do not approve, and in which they will have no voice." 431 U.S. 209, 213 (1977) (quoting complaint).

They, and this Court, didn't know the half of it. Since *Abood* upheld agency fee arrangements, public-sector unions have demonstrated unbridled creativity in channeling the fees paid by non-members to fund a range of ideological activities as wide as any political party's. Notwithstanding the requirement that activities chargeable to non-members must be "'germane' to collective-bargaining activity," *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991), as a practical matter *Abood* permits government to compel its employees to associate with and subsidize political and ideological advocacy on a host of topics, many of them quite surprising.

The labor union at issue in this case, an affiliate of the American Federation of State, County and Municipal Employees ("AFSCME"), has in the past year used agency fees to pay for advocacy on such issues as: right-to-work statutes, infrastructure spending, government privatization and contracting, the minimum wage, voter-identification laws, tax policy, immigration reform and enforcement, gun control, D.C. statehood, marijuana legalization, "racial justice," and Supreme Court nominations, among many others. It has spent agency fees to conduct an "AFSCME FOR HILLARY" rally at its annual convention, to instruct members on political organizing and voter registration, and to organize and carry out a "direct action" against a hotel affiliated with then-

candidate Donald Trump. It has even, as the *Abood* plaintiffs suspected would occur, spent agency fees to conduct religious activities.

The use of agency fees to fund overtly political and ideological activities is not unique to AFSCME. The American Federation of Teachers, National Education Association, and Service Employees International Union, among other public-sector unions and their state affiliates, similarly use agency fees to fund advocacy on hot-button issues, including trade deals, public funding for Planned Parenthood, LGBTQ rights, the "Resistance" to Trump Administration policies, and campaign-finance reform. And some public-sector unions require non-members, through their agency fees, to subsidize union organizing campaigns.

The reality is that the public-sector labor unions are inherently and pervasively political entities. They make up four of the top six largest donors to federal candidates, political parties, and political action committees. They endorse candidates in nearly all federal and state elections and organize massive get-out-the-vote efforts in support of those candidates. They take positions on seemingly every political issue under the sun. They are as deeply engaged in electoral politics as any political party, and as active in policy debates as any pressure group. No less than compelling support of the Democratic or Republican Party, forcing non-members to subsidize these political entities constitutes a serious violation of First Amendment speech and associational rights.

The Court has recognized that laws compelling government workers to subsidize speech on "core issues such as wages, pensions, and benefits" may themselves impermissibly abridge their First Amendment rights. *Harris v. Quinn*, 134 S. Ct. 2618, 2632 (2014). In reality, the agency-fee system countenanced by *Abood* inflicts far greater First Amendment injury, forcing workers to fund speech that violates their consciences, their beliefs, their political commitments, and their principles. As a factual matter, Justice Frankfurter was right when he labeled "rather naïve" the assumption underlying *Abood* "that economic and political concerns are separable." *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 814 (1961) (Frankfurter, J., dissenting).

The failure of that assumption is reason enough to overrule *Abood*, and the serious injury that decision continues to inflict on dissenting public-sector workers only heightens the urgency of so doing. The Court should reverse the decision below.

ARGUMENT

I. *Abood* Allows Government to Compel Support for Political and Ideological Advocacy

"[A] public-sector union takes many positions during collective bargaining that have powerful political and civic consequences." *Knox v. SEIU*, 567 U.S. 298, 310 (2012). For that reason, "compulsory fees constitute a form of compelled speech and association that

imposes a 'significant impingement on First Amendment rights.'" *Id.* at 311.

That impingement is far greater than the Court's previous decisions understood.

A. The Union Respondent in This Case Charges the Petitioner and Other Non-Members for a Wide Variety of Political and Ideological Advocacy

The Court has held that, under *Abood*, only activities that are "germane" to collective bargaining may be charged to non-members. *Lehnert*, 500 U.S. at 519. Unions' national conventions, it has further held, are "essential to the union's discharge of its duties as bargaining agent." *Ellis v. Railway Clerks*, 466 U.S. 435, 449 (1984). Accordingly, public-sector unions treat convention expenses as entirely chargeable to non-members.

The *Hudson* notice issued to the petitioner by the lead respondent in this case, AFSCME Council 31, states that the Council spent $268,855 for "Convention expense," all of which it treated as chargeable. Pet. App. 36a. The published proceedings of AFSCME's most recent convention[2]—held in Las Vegas over four days in July 2016—record the activities that non-members like the petitioner were compelled by the State of Illinois to subsidize:

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[2] Proceedings of the AFSCME 42nd International Convention (2016), http://2016.afscme.org/resources/document/114-16-Proceedings-Vol-1-Final-3.pdf [hereinafter "Proceedings"].

- **Political Advocacy**. AFSCME's Political Director explained that the union has rejected the notion that a union's organizational activities and its "organizing on behalf of candidates" it supports "couldn't mix." Proceedings at 127. That can be most clearly seen in the union's advocacy for Hillary Clinton's candidacy. The convention's general session featured a lengthy "AFSCME FOR HILLARY" program, culminating with a speech by the candidate herself. *Id.* at 35–41. One speaker led conventioneers in a chant of "We're With Her," shortly before they were shown a union-produced video presentation entitled "I'm With Her." *Id.* at 36. AFSCME's president stated in his remarks that the union's members "will stand with her in every corner of this nation" and were "proud to stand with her today." *Id.* at 37. Secretary Clinton, in turn, implored members to "join [her] in this campaign" by knocking on doors and conducting voter registration. *Id.* at 41. The union then conducted breakout sessions for members to learn political advocacy skills. *Id.* at 41, 57.

  The union also advocated against then-candidate Donald Trump and Republicans generally. On the first day of proceedings, the union's president led conventioneers in booing Trump. *Id.* at 10. Subjected to similar treatment were Illinois Governor Bruce Rauner, *id.* at 8, 32, 34, 38, 172, 203, Wisconsin Governor Scott Walker, *id.* at 38, 89–90, 122, 129, and Michigan Governor Rick Snyder, *id.*

at 129—all Republicans. The union actually cut short its third day of convention proceedings so that members could participate in a "TRUMP HOTEL DIRECT ACTION"—a half-mile protest march—to "send a clear message to Donald Trump." *Id.* at 103–04. The convention chartered buses for those participating in the protest. *Id.* at 54, 103.

Finally, union leaders also rallied members to participate in the union's efforts to "take back the U.S. Senate and flip control of Congress." *Id.* at 11. As regards the Senate, the convention adopted a resolution condemning Senate Republicans and demanding that the Senate Judiciary Committee "hold[] hearings on Judge Merrick Garland's nomination to the U.S. Supreme Court, followed by an up-or-down vote in the U.S. Senate." *Id.* at 25–26.

- **Advocacy Against Right-To-Work Legislation.** The convention adopted a resolution condemning and vowing to "work to prevent the passage of so-called right-to-work laws or union-busting laws that restrict 'fair share' provisions in the public sector, and to repeal any such laws that are in place." Proceedings at 30–31. More specifically, the convention also condemned proposed labor-law reforms by Illinois Governor Bruce Rauner, pledged its "solidarity" with Illinois unions opposing the proposals, and pledged to support those opposition efforts. *Id.* at 44–45.

- **Advocacy for Public Infrastructure Spending**. The convention resolved that it "supports infrastructure funding" by government and opposes efforts to privatize infrastructure or "encourage public-private partnerships." Proceedings at 22. In a separate resolution, it called on Congress and the state to "substantially increase investments in infrastructure" affecting public health. *Id.* at 176.
- **Advocacy for Increased Educational Spending**. The convention resolved that it "support[s] efforts to make college affordable for all," including through increased government spending. Proceedings at 109. It also expressed its support for free community college programs and increased financial support for students. *Id.* Lest there be any ambiguity on the point, the convention "call[ed] for a massive increase in federal and state funding for higher education," which it proposed funding through "a financial transactions tax." *Id.* at 111.
- **Advocacy for Paid Family and Sick Leave**. The convention resolved to support laws "mandating paid sick leave and paid family leave for all workers." Proceedings at 31. *See also id.* at 154 (resolving to "promote and support policies toward establishing federally mandated paid parental and sick leave").
- **Advocacy Against Private Contracting**. It is no secret that AFSCME opposes the government's use of private contractors in place of pub-

lic workers. The convention announced its opposition to "efforts to privatize public [long-term care] facilities," Proceedings at 58–59, and resolved that public pensions and retirement systems should divest from companies owning or operating private prisons, *id.* at 141–42. *See also id.* at 44 (stating opposition to "privatization of state government services" in Illinois); *id.* at 110 (stating opposition to "privatization of education, market-driven initiatives and takeovers of public institutions by business interests").

- **Advocacy for Minimum Wage Increases**. The convention endorsed the "Fight for $15" to raise the minimum wage to $15 per hour and stated its opposition to "efforts by state legislatures to restrict local governments from increasing minimum wage standards above the state minimum." Proceedings at 77.
- **Advocacy for Gun Control**. The convention called for "commonsense measures at the federal level" to "restrict[]...the sale of weapons" and "demand[ed] that Congress act now" on such legislation. Proceedings at 140. *See also id.* at 193 (stating support for "legislation to promote research relating to gun violence as a public health problem").
- **Advocacy for D.C. Statehood**. The convention endorsed legislation to recognize the District of Columbia as a state. Proceedings at 178.

- **Advocacy for Marijuana Legalization**. The convention endorsed "the legalization, strong regulation and clear taxation of cannabis, in a manner similar to that of tobacco or alcohol." Proceedings at 156.
- **Advocacy on Voting Rights**. The convention expressed its opposition to voter-identification laws, which it stated are "designed to suppress and disenfranchise voters," and called on Congress "to restore Section 4 of the Voting Rights Act to counter the Supreme Court's activist, anti-democratic decision in *Shelby County v. Holder*." Proceedings at 134–35.
- **Advocacy on Tax Policy**. Because taxes fund government, AFSCME pays keen attention to tax policy, generally supporting measures to raise taxes, except where they fall on government workers or public works financing. For example, the convention expressed its support for a new financial transactions tax, Proceedings at 111, 203, as well as for measures to block foreign mergers known as "tax inversions" that may allow corporations to reduce their tax burdens, *id.* at 151. *See also id.* at 30 (opposing "cutting taxes"). At the same time, the convention expressed its opposition to the Affordable Care Act's "Cadillac Tax" on high-cost health insurance plans often provided to public workers, *id.* at 66, and to proposals to eliminate the interest tax exemption for municipal bonds often used to fund public infrastructure projects, *id.* at 23.

- **Advocacy Against State Religious Freedom Laws**. In the wake of *City of Boerne v. Flores*, 521 U.S. 507 (1997), many states have enacted or considered state-level analogues to the federal Religious Freedom Restoration Act. The convention resolved that it "actively and publicly oppose[s]" such laws. Proceedings at 106–07.
- **Advocacy on Immigration Policy**. The convention called for "comprehensive immigration reform with a pathway to citizenship" and urged expansion of President Barack Obama's two executive actions on immigration, Deferred Action on Childhood Arrivals ("DACA") and Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA"). Proceedings at 180.
- **Advocacy on "Racial Justice."** A "Racial Justice and Public Safety" resolution adopted by the convention "affirms that black lives do matter" and proclaims that "America must heal" by "demand[ing] justice, change and conciliation." Proceedings at 114–15.
- **Advocacy for Michigan Governor Rick Snyder's Resignation**. The convention resolved that Governor Snyder is responsible for the contamination of drinking water in Flint, Michigan, with lead and "must...resign." Proceedings at 176.
- **Prayer**. Each day of the convention was opened by a religious invocation conducted by clergy who asked conventioneers to join in prayer. Proceed-

> ings at 2, 17, 57, 105. The rabbi who opened the convention's final day of proceedings proclaimed that Donald Trump is "a man who would be dictator," that "[w]e will stop him," and that "[w]e are with her." *Id.* at 200.

In short, the convention proceedings are shot through with political and ideological advocacy. And non-members forced by government to remit agency fees to the union paid for approximately 9 percent of it.[3]

B. Other Public-Sector Unions Charge Non-Members for Extensive Political and Ideological Advocacy

AFSCME is not alone among public-sector unions in using non-members' agency fees to fund political and ideological advocacy.

1. The American Federation of Teachers

For example, the American Federation of Teachers ("AFT") similarly treats its convention expenses as entirely chargeable to non-members and conducts extensive advocacy at its conventions.[4] AFT presi-

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[3] The AFSCME's 2016 LM-2 filing reports that the union has 1,158,258 full-, part-, and half-time members and received agency fees from 110,836 non-members, such that non-members comprise approximately 9 percent of the workers represented by the union.

[4] *See* Memorandum from Lorretta Johnson, Secretary-Treasurer, AFT, to Affiliated Locals and State Federations,

dent Randi Weingarten opened its most recent convention, held in July 2016, by presenting "a forceful case for Hillary Clinton," who also addressed the convention.[5] Donald Trump's campaign, Weingarten lectured conventioneers, "is perilously close to fascism."[6] And AFT, Weingarten proclaimed, would stand as a "bulwark" against Republicans like Trump and Wisconsin Governor Scott Walker.[7]

The convention adopted resolutions endorsing "racial equity," endorsing a constitutional amendment to overturn *Citizens United v. FEC*, 558 U.S. 310 (2010), condemning "islamophobia" and supporting increased immigration, calling on Congress to address prescription drug prices, advocating increased antitrust enforcement against "consolidation in healthcare," opposing the Trans-Pacific Partnership trade agreement, and supporting public funding for Planned Parenthood.[8] One single resolution adopted by the convention called for raising the minimum wage, expanding Medicare, increasing infrastructure

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Aug. 4, 2014, at 3, https://www.aft.org/sites/default/files/wysiwyg/agency_fee2014_national.pdf.

[5] AFT, *Convention 2016 Afterwords* (July 19, 2016), https://www.aft.org/sites/default/files/conv16_afterwords_day2.pdf.

[6] *Id.*

[7] *Id.*

[8] The resolutions adopted by the AFT convention are available on the union's website. *See* AFT, Resolutions, https://www.aft.org/about/resolutions.

spending and spending on public services, raising taxes on financial transactions, enacting "comprehensive immigration reform with a path to legal employment," and increasing funding for higher education institutions and students.[9]

The AFT convention is not, however, the only body vested with the union's legislative authority. While "most" resolutions are passed at the biennial convention, the AFT Executive Council "also adopts resolutions,"[10] and the Council's meetings are likewise fully chargeable to non-members.[11]

The Council's activities are no less political than the convention's. For example, in a recent resolution opposing "white supremacy," the Council declared that "President Donald Trump has failed th[e] test of moral clarity," "create[d] a false equivalency between those who protested this terror and intimidation, and the white supremacists, the Ku Klux Klan and neo-Nazi groups," and "failed to do what any other president would do to reject hate and fulfill his chief obligation to marshal all of the resources at the federal government's disposal to keep all Americans

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[9] AFT, Resolution: Attack Economic Inequality (2016), https://www.aft.org/resolution/attack-economic-inequality.

[10] *See* AFT, About Us—Resolutions, https://www.aft.org/about/resolutions.

[11] Memorandum from Lorretta Johnson, Secretary-Treasurer, AFT, to Affiliated Locals and State Federations, Aug. 4, 2016, at 3, https://www.aft.org/sites/default/files/agencyfee16-17_national.pdf.

safe." The resolution resolves that AFT will lobby "local school boards, city councils and other community venues" to adopt similar resolutions.[12]

Other resolutions recently adopted by the Council advocate "for the elimination of criminal history screening questions for initial employment, housing and financial aid applications,"[13] in support of "the climate justice movement,"[14] in "solidarity with the labor movement of Colombia" against that country's purportedly lax enforcement of labor laws,[15] against the GOP tax bill,[16] for raising the minimum wage,[17] for raising taxes on "Wall Street,"[18] and in support of

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[12] AFT, Resolution: Combatting White Supremacist Terrorism (2017), https://www.aft.org/resolution/combating-white-supremacist-terrorism.

[13] AFT, Resolution: Ban the Box (2017), https://www.aft.org/resolution/ban-box.

[14] AFT, Resolution: A Just Transition to A Peaceful and Sustainable Economy (2017), https://www.aft.org/resolution/just-transition-peaceful-and-sustainable-economy.

[15] AFT, Resolution: Columbia Labor Violations and Impunity (2017), https://www.aft.org/resolution/colombia-labor-violations-and-impunity.

[16] AFT, Resolution: Current Republican Tax Reform Proposal (2017), https://www.aft.org/resolution/current-republican-tax-reform-proposal.

[17] AFT, Resolution: Raise the Minimum Wage (2017), https://www.aft.org/resolution/raise-minimum-wage.

[18] AFT, Resolution: Take on Wall Street (2017), https://www.aft.org/resolution/take-wall-street.

legislation "ensuring each student in our public schools receives a minimum of 25 minutes of seated lunch time each school day."[19] A 2016 resolution officially endorsed Hillary Clinton for president.[20]

AFT and its state affiliates also charge non-members for political advocacy at regional conferences and training sessions. For example, the 2016 Illinois Federation of Teachers "ShIFT into Action!" conference was a hotbed of political activity.[21] Not only did delegates "attend informative workshops about...fighting for economic justice[] and having effective political conversations," but they also "registered to vote [and] volunteered for phone banks and neighborhood canvassing" in order to "support [the union's] critical election efforts."[22]

Speaking at the conference, Senator Dick Durbin urged those present to help him "get a Democratic

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[19] AFT, Resolution: The Healthy Student—Mandatory Minimum of 25 Minutes Seated Lunch Time (2017), https://www.aft.org/resolution/healthy-student-mandatory-minimum-25-minutes-seated-lunch-time.

[20] AFT, Resolution: American Federation of Teachers' Endorsement of Hillary Clinton for President (2016), https://www.aft.org/resolution/american-federation-teachers-endorsement-hillary-clinton-president.

[21] *See* Notice to Education Employees, 18, 21 (2016) (noting that the IFT convention is fully chargeable to non-members).

[22] Delegates ShIFT into Action at 2016 IFT Convention, IFT-AFT News (Dec. 13, 2016), https://www.ift-aft.org/news/2016/10/13/follow-the-ift-convention---live!.

majority in the U.S. Senate" and expressed support for Democratic Party candidates like Hillary Clinton and Tammy Duckworth.[23] Senator Duckworth also spoke.[24] AFT President Randi Weingarten, addressing the conference, proclaimed the union's support for candidates "'like Tammy Duckworth'" and announced that the Union would work to oust Illinois Governor Bruce Rauner in 2018.[25] In the keynote address, AFL-CIO Executive Vice President Tefere Gebre condemned Trump's "deplorable actions" and urged members to do the "'work'" of fixing that—that is, "vot[ing]'" to ensure "'[b]ad people [don't] get elected."[26]

Conference delegates adopted various resolutions, including ones supporting tuition-free, government-funded higher education and opposing Trump Administration immigration-enforcement policies.[27] Note that this is just one of the dozens of conferences held by AFT and its affiliates each year.[28]

Finally, AFT charges non-members for educational training and training materials that are practically indistinguishable from political and ideological prop-

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[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *See* AFT, Calendar, https://www.aft.org/our-news/calendar.

aganda.[29] AFT's most recent "AFT TEACH" conference featured "boot camp" sessions on organizing parents and "community allies" to fight the Trump Administration's education-policy agenda, influencing public policy at the local and state levels, and engaging in immigration-policy activism.[30] Likewise, the 2016 AFT Paraprofessionals and School-Related Personnel Conference addressed topics like "political action/federal legislation and fighting privatization."[31] And AFT's 2017 National Higher Education Conference in Detroit featured sessions on advocacy for state-funded higher education, "organizing a sanctuary campus" to avoid participating in the enforcement of federal immigration laws, unionizing adjunct professors, "fighting against Trump and [Education Secretary Betsy] DeVos," and participating in "[t]he Resistance" to Trump Administration policies.[32]

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[29] *See, e.g.*, Memorandum from Lorretta Johnson, *supra* n. 4, at 3; Memorandum from Lorretta Johnson, *supra* n. 11, at 3.

[30] AFT, TEACH 2017 Boot Camps (last updated May 26, 2017) https://www.aft.org/education/aft-teach/teach-2017-boot-camps. *See also* AFT, TEACH 2017 Conference Book, at 8–23 (2017).

[31] AFT, 2017 Tentative Schedule and Registration Forms (last accessed Nov. 2, 2017),https://www.aft.org/sites/default/files/psrpconf2017_notification.pdf.

[32] AFT, National High Education Organizing Conference Schedule (last accessed Nov. 2, 2017), https://www.aft.org/sites/default/files/hiedconf2017_agenda.pdf.

2. The National Education Association

Of all the public-sector unions, the National Education Association ("NEA") may have the broadest ideological agenda, publishing a 150-page book of its resolutions currently in force.[33] Among them are resolutions on such education-policy matters as school financing, charter schools, early childhood learning, class size, and standardized testing. *See* NEA Resolutions at 187 *et seq.* (listing resolutions).

The appearance of other topics is more surprising: tax reform, "social and economic justice," *id.* at 292, the constitutional convention process of Article V (NEA is opposed, preferring congressional proposal and state ratification), *id.* at 313, voting rights, *id.* at 314, historic preservation, *id.* at 315, "covert operations and counterintelligence activities," *id.* at 316, and the "self-determination of indigenous people," *id.* at 327.

And still other resolutions concern particularly divisive matters. The union had adopted resolutions supporting racial preferences at all levels for both students and educational workers, *id.* at 219, 283, 333, comprehensive sex education, *id.* at 238, adoption of the metric system in the United States, *id.* at 240, D.C. statehood, *id.* at 315, U.S. participation in the International Court of Justice and International

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[33] NEA, 2016–2017 NEA Resolutions, http://www.nea.org/assets/docs/Resolutions_2017_NEA_Handbook.pdf [hereinafter "NEA Resolutions"].

Criminal Court, *id.* at 316, and severe gun control measures, *id.* at 325–26.

As with AFSCME and AFT, NEA adopts resolutions at its annual "Representative Assembly,"[34] which it treats as fully chargeable to non-members.[35] NEA's 2016 Assembly resolved, among other things, to support congressional and presidential voting rights for U.S. territories, restoration of voting rights for felons released from prison, reinstatement of the "Fairness Doctrine" and "affirmative action in broadcast regulations and [] media ownership rules," and funding for "developmentally appropriate gender identity and LGBTQ equity education programs."[36] The Assembly opened with a speech by the NEA president condemning Donald Trump and promising

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[34] *See* NEA, 2015–2016 NEA Resolutions, Foreword, https://ra.nea.org/wp-content/uploads/2016/05/Resolutions_Summary_of_Winter_Committee_Meeting_Actions_2016-1.pdf (describing resolution process). The union appears to regard each annual Representative Assembly as readopting all of the union's in-force resolutions. *See id.* ("Resolutions adopted by the Representative Assembly shall continue in force until the next Representative Assembly acts upon the report of the Resolutions Committee.").

[35] *See, e.g.*, Oregon Educational Association / National Education Association, Notice to Fair Share Fee Payers with Supplemental Information, at 7 (Sept. 2015), http://www.choiceforteachers.com/sites/default/files/ChapMON_HudsonPackOEA_2015-2016.pdf.

[36] NEA, 2016 Legislative Amendments, https://ra.nea.org/business-items/?yr=2016&type=leg_amendment.

that the union would fight his candidacy.[37] Hillary Clinton spoke before the Assembly the next day, delivering what the NEA's house organ called a "rousing and passionate address."[38]

Like AFT, the NEA charges non-members for educational training and training materials that consist of political and ideological advocacy.[39] For example, it produces a variety of curricular materials for teachers, including a "Getting Informed and Active" program to promote "social justice" issues in the classroom and in public school administration.[40] That includes materials for discussing diversity, "privilege," and the "hierarchies of oppression."[41]

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[37] Remarks As Prepared for Delivery by NEA President Lily Eskelsen García to the 95th NEA Representative Assembly (2016), https://ra.nea.org/speech/2016/15489/.

[38] 'I'm With You,' Hillary Clinton Tells NEA RA Delegates, NEAToday (July 5, 2016), http://neatoday.org/2016/07/05/hillary-clinton-nea-ra/.

[39] *See, e.g.*, Memorandum from Lorretta Johnson, *supra* n. 4, at 3; Notice to Fair Share Fee Payers with Supplemental Information, *supra* n. 35, at 6.

[40] NEA, Getting Informed and Active, http://www.nea.org/home/64661.htm.

[41] NEA, Diversity Toolkit: Social Justice, http://www.nea.org/tools/30414.htm.

3. The Service Employees International Union

Like AFT, AFSCME, and NEA, the Service Employees International Union ("SEIU") also charges non-members for conventions at which it enacts resolutions on political and ideological issues and engages in extensive political advocacy.[42] While SEIU is not typically thought of as a public-employee union, more than half of its 2 million or so members work for government.[43]

At SEIU's 2016 convention, Hillary Clinton "drew robust applause" for her "promise[] to take action on the issues SEIU members have been fighting for," including "immigration reform," "fair pay," ending the "school-to-prison pipeline," and "end[ing] the ep-

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[42] Memorandum from Maine State Employees Association to Employees Represented Under Contracts Providing For Service Fee Payments (June 16, 2016), at 13, 21 (noting that "Expenses associated with the annual [MSEA] meeting (convention)... are considered fully chargeable" and that "[SEIU] conferences" are fully chargeable), http://www.mseaseiu.org/non_members/2016%20Hudson%20Notice.pdf. *See also* Memorandum from Maine State Employees Association to Employees Represented Under Contracts Providing For Service Fee Payments (June 18, 2015), at 13, 19, 21 (noting that "[MSEA] Conventions and conferences" and SEIU conferences are fully chargeable), http://www.mseaseiu.org/non_members/2015_Hudson_Notice.pdf.

[43] SEIU, The Complete Steward's Manual, at 7, "SEIU: Snapshots", http://www.seiu.org/cards/the-complete-stewards-manual/seiu-snapshots/p7.

idemic of gun violence in America."[44] "Featured sessions" instructed members on "SEIU's political plan for 2016."[45] One convention resolution called for the release of terrorist Oscar Lopez Rivera, described as the "longest-held political prisoner in Puerto Rico."[46] Other resolutions adopted by the convention advocate in support of the "Fight for $15," citizenship for undocumented aliens, "economic justice," "racial justice," "environmental justice," higher infrastructure spending, higher taxes, criminal justice reform, ending the death penalty.[47] The convention resolved that the union will "Elect Hillary Clinton as president...by mobilizing millions of voters."[48]

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[44] Updates from the 26th SEIU International Convention, SEIU.org (May 26, 2016), http://www.seiu500.org/2016/05/updates-from-the-26th-seiu-international-convention/.

[45] *Id.*

[46] SEIU, Resolution No. 221 (2016), http://s3.amazonaws.com/convdocs.seiumedia.net//resolutions/221-Support-of-Release-of-Oscar-Lopez-Rivera.pdf?mtime=20160506195815.

[47] *See generally* SEIU, Resolution Nos. 102A, 106A, 107, 108A, 114A, 205A, 224 (2016). The SEIU collects its convention resolutions at http://conventiondocs.seiu.org/resolutions-committee/.

[48] SEIU, Resolution No. 104A (2016), http://s3.amazonaws.com/convdocs.seiumedia.net//resolutions/104A-Building-a-Better-Future-2016-Plan-to-Win-Resolution-052016.pdf?mtime=20160521232447.

C. Public-Sector Unions Charge Non-Members for Union Organizing Advocacy

It can be safely presumed that public-sector employees who have affirmatively rejected joining a labor union object to its advocacy to organize other workers outside of their own bargaining units and employers. Yet non-members are often compelled by government to fund that speech, as well, on the theory (first adopted by the Ninth Circuit in a case arising under the National Labor Relations Act) that such organizing may affect "the wages, benefits, and working conditions of employees in the bargaining unit" by reducing competition by employees across an industry. *United Food and Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760, 768–69 (9th Cir. 2002) (en banc) (per Reinhardt, J.).

Relying on that precedent, a New York AFSCME affiliate charged non-member probation officers for its advocacy "organizing low-wage private-sector employees...in the developmental disability, food service, and courier industries." *Scheffer v. Civil Serv. Employees Ass'n, Local 828*, 610 F.3d 782, 785 (2d Cir. 2010). The Second Circuit held that such advocacy was "germane" to collective bargaining—and so in general was chargeable by the union to non-members—but could not be charged to the particular non-members before the court, due to the absence of evidence that their not paying the costs of the organizing presented a free-rider problem. *Id.* at 790. The Second Circuit's decision therefore permitted the un-

ion to continue charging its organizing advocacy to most of the other 18,700 non-members paying it agency fees. *Id.* at 785.

Other AFSCME affiliates have attempted the same gambit, with varying degrees of success. *See, e.g., Mitchell v. City of Philadelphia*, No. CIV.A.99-6306, 2008 WL 4291154, at *8 (E.D. Pa. Sept. 16, 2008), *aff'd*, 344 F. App'x 775 (3d Cir. 2009) (holding that such expenses are not properly chargeable to non-members). Unfortunately, AFSCME and other national labor organizations have not disclosed which of their affiliates treat organizing expenses as chargeable to non-members.

One affiliate union that does is the union respondent in this case. The *Hudson* notice it issued to the petitioner states that it regards as chargeable, at least in part, expenses associated with "[o]rganizing other bargaining units," as well as "[s]eeking to gain representation rights in units not represented by AFSCME." Pet. App. 32a. The notice, however, does not provide enough information for non-members to determine whether they have been compelled to subsidize organizing advocacy.

II. *Abood* Fails to Account for the Reality that Labor Unions Are Pervasively Political and Ideological Organizations

Abood assumed that non-members' First Amendment rights could be protected by "drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activi-

ties unrelated to collective bargaining, for which such compulsion is prohibited." 424 U.S. at 236. But what use is drawing lines when every part of a labor union and its work is suffused with political and ideological purpose? By failing to account for the fact that the exaction of agency fees forces non-members to subsidize and associate with what are in reality *political organizations*—not mere economic representatives—the Court's decisions have not "given adequate recognition to the critical First Amendment rights at stake." *Knox*, 567 U.S. at 311.

Labor unions' political power and clout cannot be seriously questioned. There is a reason, after all, that Hillary Clinton addressed each of the public-sector unions' national conventions in 2016.

One thing they bring to the table is money. For the federal election cycles from 1990 through 2016, SEIU was the top political contributor in the United States, directing some $279,681,422 to candidates, parties, and political action committees, with just short of 100 percent of it going to Democrats.[49] NEA, AFSCME, and AFT are third, fifth, and sixth on that list, respectively, having contributed a combined total of over $400 million—again, almost all of it to Democrats.[50] In 2016 cycle alone, public-sector un-

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[49] Center for Responsive Politics, Top Organization Contributors, OpenSecrets.org, https://www.opensecrets.org/orgs/list.php?cycle=ALL.

[50] *Id.*

ions injected over $60 million into political campaigning.[51]

That does not account, however, for the unions' in-house political activities. "[U]nions mount intense campaigns—with workplace fliers, phone calls and door-knocking—to get their members to vote for the labor-backed candidate."[52] According to an analysis of union filings with the Labor Department, "[t]he hours spent by union employees working on political matters were equivalent in 2010 to a shadow army much larger than President Barack Obama's [2012] re-election staff.... The reported hours worked in 2010 were equivalent to 3,242 full-time operatives with a payroll of $214 million"[53] And that does not even account for the canvassing and election-day activities of members themselves. Indeed, unions often insist that collective bargaining agreements provide workers with the day off on election day so that union members can participate in get-out-the-vote ef-

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[51] Center for Responsive Politics, Public Sector Unions: Long-Term Contribution Trends, OpenSecrets.org, https://www.opensecrets.org/industries/totals.php?cycle=2018&ind=P04.

[52] Steven Greenhouse, Can Labor Still Turn Out the Vote?, N.Y. Times (Mar. 4, 2016), https://www.nytimes.com/2016/03/06/opinion/sunday/can-labor-still-turn-out-the-vote.html.

[53] Tom McGinty & Brody Mullins, Political Spending by Unions Far Exceeds Direct Donations, Wall St. J. (July 10, 2012), https://www.wsj.com/articles/SB10001424052702304782404577488584031850026.

forts.[54] And, as described above, all of the major labor unions engage in extensive political advocacy at their conventions, provide campaign training for their members, and organize rallies and other public events featuring Democratic Party candidates.

Then there is the lobbying. As their numerous resolutions reflect, the public-sector labor unions take public positions on seemingly every issue under the sun, from public funding for abortions to the minimum wage. For a recent "Lobby Days" event, New York teachers' unions descended on the state capital to lobby legislators on a broad legislative agenda, including a bill regulating "use and maintenance and repair of air conditioners used by residents of adult homes" and one designating the monk parakeet a protected bird.[55] The same kinds of events occur regularly in most states.

Public-sector unions also seek to persuade and influence the public. AFSCME's operations are marked by intense and pervasive advocacy every day of the year. Over the past year, the union has weighed in on such issues as this litigation, tax reform, immigration enforcement, Puerto Rico's fiscal plan, the

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[54] *See, e.g.*, Keith Bradsher, Little-Known Provision in U.A.W. Contract Gives Election Day Holiday, N.Y. Times (Dec. 30, 1990), http://nyti.ms/2ApZq6B.

[55] Sarah Butrymowicz & Geoff Decker, Unions Lobby Power Remains Unmatched, Hechinger Rep. (Mar. 6, 2013), http://hechingerreport.org/unions-lobby-power-remains-unmatched/.

nomination and confirmation of then-Judge Neil Gorsuch to this Court, President Trump's "travel ban" executive order, FAA privatization, "Trump's First 100 Days in Office," and nearly all of President Trump's cabinet-level nominations.[56] In each instance, the union posted on its website a press release stating its position. Even if the union treats some of this advocacy as non-chargeable—which is impossible to discern from its *Hudson* notices and filings with the Department of Labor—it is still being subsidized by non-members' agency fees, which defray the cost of the union's communications platforms, workforce, and other overhead. Pet. App. 29a–37a (reporting that non-members are charged for salaries, editorial services, outside services, and numerous other overhead items).

AFT and NEA also regularly weigh in on a broad variety of political and policy issues, with advocacy that is at least subsidized by non-members' agency fees. Issuing dozens of press releases each month, AFT has recently spoken out in opposition to the GOP tax reform bill, the Trump Administration's withdrawal from the Paris Agreement on climate, this Court's decision in *Trinity Lutheran v. Comer*, No. 15-577 (June 26, 2017), the Trump Administration's tax plan, U.S. airstrikes on Syria, Ivanka Trump's visit to the National Air & Space Museum, and the nomination of then-Judge Neil Gorsuch to

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[56] *See* AFSCME, 2017 Press Releases, https://www.afscme.org/news/press-room/press-releases/2017.

this Court.[57] Likewise, NEA has recently issued press releases opposing the tax reform bill, the *Trinity Lutheran* decision, the American Health Care Act, the Gorsuch nomination (three times), and the Trump Administration's "travel ban."[58]

Under *Abood*, non-members are compelled to subsidize and associate themselves with all of these activities. "Making a contribution, like joining a political party, serves to affiliate a person with a candidate." *Buckley v. Valeo*, 424 U.S. 22 (1976). So, too, with a union.

The difference is that campaign contributions are not compulsory. In fact, in no other circumstance does the government compel a citizen to fund and associate with organizations that advocate positions on controversial issues like abortion, immigration policy, and religious liberty and that campaign for candidates who share their views on those and other issues. Yet that is what *Abood* anomalously sanctions: compelled support of a labor union even by non-members who believe its principles, policy positions, and endorsements are abhorrent and immoral. That the First Amendment cannot bear.

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[57] AFT, Press Releases, https://www.aft.org/press/releases.

[58] NEA, Press Center, http://www.nea.org/home/1709.htm.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

SAM KAZMAN
COMPETITIVE
ENTERPRISE INSTITUTE
1310 L St., N.W.
Washington, D.C. 20005

ANDREW M. GROSSMAN
Counsel of Record
MARK W. DELAQUIL
RANDAL J. MEYER
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

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